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DEPARTMENT OF EDUCATION

34 CFR Part 263

RIN 1810-AB58

Indian Education Discretionary Grant Programs; Professional Development Program

AGENCY: Office of Elementary and Secondary Education, Department of Education.

ACTION: Final rule.

SUMMARY: The Department of Education (Department) amends the regulations for the Indian Education Professional Development (PD) Program, under section 6122 of the Elementary and Secondary Education Act of 1965, as amended (ESEA). This final rule provides additional time for participants in current PD grant-funded programs who are impacted by the extraordinary circumstances related to the COVID-19 pandemic to find qualifying employment or to complete their work-related payback obligation.

EFFECTIVE DATE: [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION: The PD program provides grants to train Indian individuals to become teachers or administrators in school districts that serve a high proportion of Indian students. ESEA section 6122 (20 U.S.C. 7442). Under section 6122(h) of the ESEA, the Secretary must require, by regulation, that individuals who receive training under this program either perform work related to the training and that benefits Indian students in a local educational agency that serves a high proportion of Indian students, or repay all or a prorated part of the assistance received. Under the program regulations implementing this requirement, when participants graduate from their pre-service training program, they must report on their employment status every six months. 34 CFR 263.10(b). If they have not found qualifying employment in 12 months, then they are referred for cash payback. 34 CFR 263.8(c)(1). In addition, graduates who start their work payback but are no longer in qualifying employment and do not submit evidence of such

employment within a 12-month period are also referred for cash payback. 34 CFR 263.8(c)(1).

The Department understands that, due to the national emergency caused by COVID-19, it is very difficult for graduates to find qualifying employment at this time and, in some cases, previously employed individuals have lost their jobs. The Department is therefore providing additional time for participants to meet these regulatory requirements regarding evidence of employment, by amending the provisions in § 263.8(c). Participants who graduate from a program during Federal fiscal year (FY) 2020 (October 1, 2019 – September 30, 2020) will have 24 months to submit evidence of qualifying employment. Similarly, employed graduates in work payback during FY 2020 must submit evidence of continuing employment within a 24-month period, rather than a 12-month period. The Department is changing only the provision for converting students to cash payback (34 CFR 263.8(c)(1)); the regulatory requirements for reporting every six months remains unchanged (34 CFR 263.10(b)).

Waiver of Notice and Comment Rulemaking and Delayed Effective Date

Under the Administrative Procedure Act (APA) (5 U.S.C. 553), the Department generally offers interested parties the opportunity to comment on proposed regulations. However, the

APA provides that an agency is not required to conduct notice and comment rulemaking when the agency for good cause finds that notice and public comment thereon are impracticable, unnecessary, or contrary to the public interest. 5 U.S.C. 553(b) (B). Here, there is good cause to waive notice and comment rulemaking, because going through the full rulemaking process would delay the Department's ability to provide relief to PD program participants who would otherwise be referred for cash payback.

The good cause exception is appropriate "in emergency situations or where delay could result in serious harm." See *Jifry v. FAA*, 370 F.3d 1174, 1179 (D.C. Cir. 2004) (internal citations omitted). "The public interest prong of the good cause exception to the APA notice and comment requirement is met only in the rare circumstance when ordinary procedures--generally presumed to serve the public interest--would in fact harm that interest." *Mack Trucks Inc. v. E.P.A.*, 682 F.3d 87, 95 (D.C. Cir. 2012).

The COVID-19 pandemic has escalated at a rapid pace and scale, resulting in extraordinary circumstances including widespread school closures. Many participants are experiencing difficulties in finding employment, or have lost employment, and we have received requests for extensions of these deadlines. The COVID-19 crisis has hit particularly hard in Indian Country.

Some participants who graduated in 2019 are not able to find jobs for fall 2020, given the crisis and the lack of resources for many school districts. Permitting these Native American participants to continue to seek employment in schools that serve a high proportion of Native American students, rather than being forced into debt during this difficult time, is in the public interest. There are approximately 500 participants currently in work-related payback status who are required to submit their employment status every six months (see 34 CFR 263.10). For those participants who lost their job a number of months ago, or who graduated in spring 2019 and are still seeking employment, their second six-month submission may be due within days or weeks and would trigger the transition to cash payback under § 263.8. Due to the emergency nature of this situation, there is not time for public notice and comment. By extending the timeline for submission of employment evidence, this final regulation ensures that these participants will not be forced into debt during this crisis, which would be contrary to the public interest. Instead they can continue to seek qualifying employment.

The APA also generally requires that regulations be published at least 30 days before their effective date but excepts from that requirement rules that grant or recognize an exemption or relieve a restriction (5 U.S.C. 553(d)(1)).

Because these regulations relieve restrictions on participants by providing additional time to obtain qualifying employment, this exception to the delayed effective date under the APA applies.

Executive Orders 12866, 13563, and 13771

Regulatory Impact Analysis

Under Executive Order 12866, it must be determined whether this regulatory action is "significant" and, therefore, subject to the requirements of the Executive order and subject to review by the Office of Management and Budget (OMB). Section 3(f) of Executive Order 12866 defines a "significant regulatory action" as an action likely to result in a rule that may--

(1) Have an annual effect on the economy of \$100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities in a material way (also referred to as an "economically significant" rule);

(2) Create serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impacts of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles stated in the Executive order.

This final regulatory action is not a significant regulatory action subject to review by OMB under section 3(f)(1) of Executive Order 12866.

Under Executive Order 13771, for each new regulation that the Department proposes for notice and comment or otherwise promulgates that is a significant regulatory action under Executive Order 12866 and that imposes total costs greater than zero, it must identify two deregulatory actions. For FY 2020, any new incremental costs associated with a new regulation must be fully offset by the elimination of existing costs through deregulatory actions. Because this final rule is not a significant regulatory action, the requirements of Executive Order 13771 do not apply. Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this rule as not a "major rule," as defined by 5 U.S.C. 804(2).

We have also reviewed these regulations under Executive Order 13563, which supplements and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent

permitted by law, Executive Order 13563 requires that an agency-

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(1) Propose or adopt regulations only on a reasoned determination that their benefits justify their costs (recognizing that some benefits and costs are difficult to quantify);

(2) Tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives and taking into account--among other things, and to the extent practicable--the costs of cumulative regulations;

(3) In choosing among alternative regulatory approaches, select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity);

(4) To the extent feasible, specify performance objectives, rather than the behavior or manner of compliance a regulated entity must adopt; and

(5) Identify and assess available alternatives to direct regulation, including economic incentives--such as user fees or marketable permits--to encourage the desired behavior, or provide information that enables the public to make choices.

Executive Order 13563 also requires an agency "to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible." The



Office of Information and Regulatory Affairs of OMB has emphasized that these techniques may include "identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes."

We are issuing this final regulation only on a reasoned determination that its benefits justify its costs. In choosing among alternative regulatory approaches, we selected those approaches that maximize net benefits. Based on the analysis that follows, the Department believes that this final regulation is consistent with the principles in Executive Order 13563.

We also have determined that this regulatory action does not unduly interfere with State, local, and Tribal governments in the exercise of their governmental functions.

In accordance with the Executive orders, the Department has assessed the potential costs and benefits, both quantitative and qualitative, of this regulatory action. This extension of the regulatory deadline for participants to find and keep qualifying employment is not expected to have any costs because it merely allows additional time for those participants to submit their evidence of employment in light of the extraordinary circumstances related to the COVID-19 pandemic. There is no additional burden on our stakeholders but rather a benefit, and the additional burden on the Department, if any, is minor.

Regulatory Flexibility Act Certification

The Regulatory Flexibility Act does not apply to this rulemaking because there is good cause to waive notice and comment under 5 U.S.C. 553.

#### Paperwork Reduction Act of 1995

The final regulations do not create any new information collection requirements.

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#### List of Subjects in 34 CFR Part 263

Business and industry, College and universities, Elementary and secondary education, Grant programs—education, Grant

programs-Indians, Indians-education, Reporting and recordkeeping requirements, Scholarships and fellowships.

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Betsy DeVos,  
*Secretary of Education.*

For the reasons discussed in the preamble, the Secretary amends title 34 of the Code of Federal Regulations as follows:

PART 263--INDIAN EDUCATION DISCRETIONARY GRANT PROGRAMS

1. The authority citation for part 263 continues to read as follows:

AUTHORITY: 20 U.S.C. 7441, unless otherwise noted.

2. Section 263.8 is amended by adding a new paragraph (c) (5) to read as follows:

§ 263.8 What are the payback requirements?

\* \* \* \* \*

(c) \* \* \*

(5) Notwithstanding paragraph (c) (1) of this section, participants who exit or complete a grant-funded training program in Federal fiscal year 2020 (October 1, 2019-September 30, 2020) who do not submit employment verification within 24 months of program exit or completion, and participants with qualifying employment during Federal fiscal year 2020 who do not submit employment verification for a 24-month period, will automatically be referred for a cash payback unless the participant qualifies for a deferral as described in § 263.9.

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[FR Doc. 2020-13286 Filed: 6/24/2020 8:45 am; Publication Date: 6/25/2020]